

# EXHIBIT 12

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF MASSACHUSETTS  
3  
4 EGENERA, INC.,  
5 Plaintiff,  
6 vs. Civil Action No.  
7 CISCO SYSTEMS, INC. 1:16-cv-11613-RGS  
8 Defendant.  
9  
10  
11 (THIS TRANSCRIPT IS DESIGNATED AS  
12 CONFIDENTIAL - ATTORNEYS' EYES ONLY)  
13  
14 VIDEOTAPED DEPOSITION OF RYAN SULLIVAN, PH.D.  
15  
16 Friday, June 22, 2018  
17 9:05 a.m.  
18  
19 San Diego Marriott Hotel Del Mar  
20 San Diego, California  
21  
22  
23 Reported by:  
24 Harry Alan Palter  
25 CSR No. 7708, Certified LiveNote Reporter

1 Q And Exhibit 1 is your resume; correct?

2 A Attachment A-1 to Exhibit 1 is my current  
3 resume or sometimes referred to as a CV.

4 Q And it was accurate as of April 2018 when you  
5 submitted your report; correct?

6 A To the best of my knowledge, yes.

7 Q And are there any changes that you would need  
8 to make to attachment A-1 to Exhibit 1?

9 A I suppose some of the numbers regarding  
10 deposition testimony and expert reports could be updated  
11 for information or events that have occurred since I  
12 submitted my initial report. Aside from that, I think  
13 all of it is -- again, to the best of my knowledge -- I  
14 believe it is accurate. I've done my best to include  
15 the salient points and highlights of my background and  
16 experience. But, of course, by its very nature, it is a  
17 summary, and thus, incomplete.

18 Q And you are not an engineer; correct?

19 A That's right.

20 Q And you are not a computer scientist; correct?

21 A I would not consider myself a computer  
22 scientist, per se. Although, as an economist and a  
23 statistician, I do a lot of work relating to computers  
24 and coding, for example.

25 Q You are not an expert in data centers; correct?

1 A I have expertise in economics and finance as it  
2 relates to the marketplace of data centers; yet, by way  
3 of example, I do not operate data centers or work in an  
4 engineering capacity as it would relate to data -- data  
5 centers.

6 Q You are not a technical expert in data centers;  
7 correct?

8 A Not from an engineering perspective; yet,  
9 economics, finance, and statistics are often considered  
10 technical fields.

11 Q You are not an engineering expert in servers;  
12 correct?

13 A That's right.

14 Q And you're not here offering technical opinions  
15 about how the accused products work; correct?

16 A Well, I'm not quite sure I understand your  
17 question.

18 I do have opinions relating to contributions of  
19 the technology at issue to the products. So perhaps you  
20 could clarify?

21 Q Aside from contributions regarding the  
22 technology at issue to the products, you are not here to  
23 offer any opinions on how the products themselves  
24 actually work; correct?

25 A I'm not sure I'm following your question in

1 10:35 A.M.

2 BY MR. HARRITS:

3 Q Dr. Sullivan, you do not have any opinions

4 about whether or not Cisco infringes the '430 patent;

5 correct?

6 A That's right.

7 Q And so for the purposes of your analysis, you  
8 assume that Cisco infringes the '430 patent; correct?

9 A That is an assumption that is part of the role  
10 of calculating damages in this case.

11 Q And you'd agree with me that if Cisco does not  
12 infringe the '430 patent, it does not have to pay  
13 damages to Egenera; correct?

14 A I could not say with certainty what all the  
15 legal claims are or remedies may be.

16 Q To the best of your knowledge, if Cisco does  
17 not infringe the '430 patent, it does not have to pay  
18 damages to Egenera; correct?

19 MR. WILLIAMS: Objection. Calls for a legal  
20 conclusion.

21 THE WITNESS: I could not say for the reasons I  
22 just described. My understanding would be if there is  
23 not a finding of liability as it relates to the claim of  
24 infringement of the '430 patent, then the reasonable  
25 royalties would not apply.

1 correct?

2 A Well, they are both reliable approaches.

3 Q But you don't say one is more reliable than the  
4 other; correct?

5 A No. I would not think of it that way; rather,  
6 I think of them as both being reliable.

7 Q So you don't have any opinion about whether or  
8 not the cost-savings approach is more reliable than  
9 the -- than the acquisition approach; correct?

10 A Again, I have not thought about it in the way  
11 you're asking. I simply think of both approaches as  
12 being reliable.

13 Q So it's your opinion that both approaches are  
14 equally reliable; correct?

15 A I have not thought about it as equally more or  
16 less reliable. I simply think of both approaches as  
17 being reliable.

18 Q You do not provide an opinion that Egenera is  
19 entitled to lost profits; correct?

20 A That's right.

21 Q And you didn't do any calculations to figure  
22 out what, if any, lost profits Egenera is entitled to;  
23 correct?

24 A I've looked at the commercial relationship  
25 between Egenera and Cisco as detailed in my report. And

1 that certainly has significant impact in terms of how  
2 one should think about a reasonable royalty. But I have  
3 not separately calculated an amount of lost profits as a  
4 separate remedy apart from a reasonable royalty.

5 Q Handing you what's marked as Sullivan  
6 Exhibit 6.

7 (Exhibit 6 marked)

8 BY MR. HARRITS:

9 Q It is the -- a document bearing EGENERA00570512  
10 and contains an Egenera General Purchase Agreement; is  
11 that correct?

12 A I see a letter on the first page where the  
13 subject is relating -- or states: "Execution of General  
14 Purchase Agreement, two copies." And then the second  
15 page, I see at the heading, "General Purchase  
16 Agreement."

17 Q If you could please turn to page 8 of the  
18 document. It ends in EGENERA519. This is Exhibit 6.

19 Do you understand that Exhibit 6 relates to the  
20 purchase of a BladeFrame system from Egenera by Cisco  
21 Systems?

22 MR. WILLIAMS: Counsel, if you're going to ask  
23 him to generally talk about the document, you might give  
24 him a chance to review it.

25 MR. HARRITS: He has a chance to review it.

1 Q Right. But it's an "or." It can be thought of  
2 as this or that. Is that not how you mean that?

3 A Maybe you lost me.

4 You said you were reading from my report, but  
5 then you didn't. So now I'm lost. Maybe just try  
6 again.

7 Q Well, you say: It can be thought of as a  
8 surplus to Cisco of \$3,574 per server; correct?

9 A Your paraphrasing makes it really difficult for  
10 me to agree with your question. I can -- I can  
11 elaborate, but when you're paraphrasing like that, it  
12 makes it difficult. Or you can just ask me a separate  
13 question, independent of the report.

14 Q Let me try a separate question.

15 Is it your opinion that the \$3,574 of cost  
16 savings is profit to Cisco?

17 A Yes, it is additional profit to Cisco.

18 Q So in your opinion, Cisco makes an additional  
19 \$3,574 of profit for each server it sells; correct?

20 A That's not quite right, but it's close.

21 So there is additional profit that Cisco earns  
22 of this magnitude on a per-server basis. But there's  
23 more to it than that, given that this is as it relates  
24 to the benefits of the patented technology.

25 Q Okay. So -- now, you'd agree with me that

1 understand it.

2 Q And do you understand that Dr. Jones has  
3 accused more than one way of using UCS of infringing?

4 A That sounds familiar to me; yet that is an  
5 infringement question for Dr. Jones.

6 Q So your analysis is based on the assumption  
7 that Dr. Jones is correct in each of the ways he says  
8 that UCS infringes the '430 patent?

9 A No. I have simply assumed infringement.

10 Q So your analysis is not based in any way on how  
11 Dr. Jones alleges UCS infringes; is that fair?

12 A I'm not sure I follow the question. However, I  
13 simply assume infringement as articulated in my report.

14 Q So your analysis is not based on how Dr. Jones  
15 alleges UCS infringes; correct?

16 A It's based upon an assumption of infringement.  
17 It's not based upon the infringement analysis I guess is  
18 probably the best way I could put it.

19 Q Okay.

20 A I have to say, I'm really struggling with your  
21 questions, because these are all infringement questions  
22 for Dr. Jones; whereas, you know, I have assumed  
23 infringement for purposes of my analysis.

24 (Brief pause)

25 Q You based your analysis -- your analysis is

1 Q So what does the blade server unit base  
2 represent?

3 A While, I detail it more in my report, in  
4 effect, this is the unit base of blade servers which  
5 serves as a metering mechanism to determine or measure  
6 the extent of use of the patented technology as the  
7 servers are used as part of the UCS system.

8 Q What do you mean by "metering mechanism"?

9 A A means of counting. Being able to measure the  
10 extent of use.

11 As I explain in my report, the number of  
12 servers is a reasonable measure of the extent of use of  
13 technology because the benefits scale with the number of  
14 servers.

15 Q So the blade server unit base is a measure of  
16 the extent of use of the '430 patent?

17 A I think generally, the number of servers serves  
18 as a measure of the extent of use, given that the  
19 servers are being used in infringing UCS systems that  
20 naturally include more than just the servers.

21 Q So it's your opinion, then, that all the  
22 blade -- everything listed in the blade server unit base  
23 of Exhibit 5 are used in an infringing UCS system?

24 A I did not follow that.

25 Q Is it your opinion that all the blade servers

1 in the blade server unit base attached in E-5 are used

2 in an infringing UCS system?

3 A My understanding is that the blade servers that

4 are comprised of the unit base are used in infringing

5 UCS system.

6 Q Does your damage analysis differentiate between  
7 system and methods claims?

8 A I have not made a separate distinction under  
9 system or method claims. I treat the patent as a single  
10 invention.

11 Q And, similarly, for the rack servers -- so to  
12 calculate your rack server unit base, you started with a  
13 total number of rack servers sold -- correct? -- minus  
14 the foreign sales and the sales with no revenue?

15 A Not quite.

16 Q What am I missing there?

17 A So I identified the rack servers that were sold  
18 by Cisco in the time period that's noted. And I then  
19 excluded non-U.S. sales and made adjustments for  
20 zero-revenue sales, along within the other adjustments  
21 that are described in attachment E-5.

22 Q Which is removing rack servers use of UCS Mini  
23 configuration and then removing the share of rack  
24 servers that are not used with UCS Manager?

25 A There are a couple of adjustments in attachment

1 Q Other than what's listed in attachment E-5, did  
2 you do any other apportionment to get your server unit  
3 base to account for noninfringing deployments?

4 MR. WILLIAMS: Objection. Vague.

5 THE WITNESS: I did not make further  
6 apportionments to the unit base; rather, I did make  
7 further apportionments to the royalties.

8 BY MR. HARRITS:

9 Q Okay. If the additional number of servers used  
10 in your server unit base in attachment E-5 used in  
11 deployments that did not infringe, would that have an  
12 effect on your royalty analysis?

13 A If the number of systems that infringe is  
14 different, then that would cause numbers to be  
15 different.

16 Q Did you assume that Cisco UCS systems that do  
17 not include fabric extenders infringe the '430 patent?

18 A I'm sorry. Say that again?

19 Q Did you assume that Cisco UCS systems that do  
20 not include fabric extenders infringe the '430 patent?

21 MR. WILLIAMS: Objection. It's beyond the  
22 scope. Foundation.

23 THE WITNESS: I have simply assumed  
24 infringement as alleged. I have not -- this is the same  
25 question as the whole line you were asking a while back

1 say, you didn't make any determination of whether or not  
2 servers that were sold without an output model should be  
3 included. Sorry. Module.

4 THE WITNESS: Okay.

5 THE REPORTER: Do it again, please.

6 MR. HARRITS: Absolutely.

7 MR. PACKIN: Why don't we take a break.

8 MR. HARRITS: Let's take a break.

9 THE VIDEOGRAPHER: We are off the record at  
10 2:26 P.M.

11 (Off the record)

12 THE VIDEOGRAPHER: We are back on the record at  
13 2:37 P.M.

14 BY MR. HARRITS:

15 Q So I think there might have been a little bit  
16 of confusion at the end of the last session. We were  
17 talking past each other. So I just want to try and  
18 clear the record up.

19 You have not made a separate determination  
20 whether UCS systems that do not use fabric extenders  
21 should be included in your server unit base; is that  
22 fair?

23 A I have not made a determination of what  
24 infringes and what does not infringe. I simply have  
25 assumed infringement.

1 Q And you have not made a separate determination  
2 whether UCS systems that do not use I/O modules should  
3 be included in your server unit base?

4 A Again, I have not made a determination of what  
5 infringes and what does not infringe; rather, I have  
6 simply assumed infringement for purposes of my analysis.

7 MR. WILLIAMS: We're done.

8 MR. HARRITS: Silence.

9 BY MR. HARRITS:

10 Q Now, looking at attachment E-6 to your report,  
11 E-6 calculates the average numbers of servers sold per  
12 customer; is that correct?

13 A It's the number of blade and rack servers per  
14 customer with ID.

15 Q And the values you use for the blade servers  
16 sold to customers with IDs and rack servers sold to  
17 customers with IDs are not the same values as your blade  
18 server unit base and your rack server unit base; is that  
19 correct?

20 A That's right.

21 Q So your average number of servers per customer  
22 includes servers that you have not included in your  
23 infringing server base.

24 A No. That's not right.

25 Q Well, why is the number that you used in

1 UCS system, which is in part why I have, you know,  
2 apportioned and isolated to the contributions of  
3 the '430 patent.

4 BY MR. HARRITS:

5 Q If we look at Exhibit J-2 -- strike that.

6 Is it your view that the '430 patented features  
7 creates the basis of consumer demand for UCS?

8 A From what I have seen, the technology claimed  
9 in the '430 patent as manifested in UCS, is a  
10 significant driver of demand; yet, I am not assuming or  
11 opining that it is the basis of demand.

12 Furthermore, my analysis does not -- or is  
13 not -- based upon a belief or an assumption that the  
14 '430 is the basis for demand.

15 Q So you would agree with me that the entire  
16 market value rule should not be applied in this case?

17 MR. WILLIAMS: Objection. Calls for a legal  
18 conclusion. Outside the scope. Foundation.

19 THE WITNESS: Well, I have not applied the  
20 entire market-value rule for purposes of my nationals.

21 That aside, there is substantial evidence  
22 demonstrating that the patented technology claimed in  
23 the '430 patent as manifested in UCS is the primary  
24 driver of demand for UCS; yet, again, nonetheless, I  
25 have not attributed all of the demand to the '430 patent

1 demonstrated by substantial evidence. Mounting screws  
2 can be one part of the package, which is line-itemed  
3 out, but yet driven by the UCS system.

4 As I indicated earlier, the technology claimed  
5 in the '430 patent as implemented by Cisco is a primary  
6 driver of the UCS system. It is the key driver of  
7 demand. However, I have apportioned the royalties  
8 specifically to the unique contributions of the '430  
9 patent separate and apart from other factors such that I  
10 clearly am not using the entire market value rule.

11 Q So it's your understanding that the UCS  
12 components such as mounting screws are sold as a system  
13 rather than as separate components?

14 A That strikes me as a legal question in terms of  
15 what constitutes a sale. However, according to Cisco,  
16 all of the items that they produced in their financial  
17 data were all sales that were part of the unified UCS  
18 system.

19 Q So it's your understanding that when someone  
20 purchases a UCS system, you couldn't purchase mounting  
21 screws separately from Cisco? -- separately from someone  
22 who -- strike that.

23 So your -- it's your opinion that things like  
24 mounting screws cannot be purchased separately for use  
25 within UCS?

1 MR. WILLIAMS: Objection. Vague.

2 THE WITNESS: I'm not rendering that opinion.

3 BY MR. HARRITS:

4 Q Do you have an opinion as to whether things  
5 like mounting screws or cabling can be purchased  
6 separately from Cisco for use with UCS?

7 A What do you mean by "purchased separately"?

8 Q So your analysis is based on the assumption  
9 that various UCS components are not sold individually;  
10 is that correct?

11 A No.

12 Q How does your analysis take into account that  
13 various UCS components can be sold individually?

14 A Well, as I've been describing and as detailed  
15 in my report, the sales data are provided on a line-item  
16 basis. And as described in the -- I believe it was  
17 interrogatories and deposition testimony of Cisco, that  
18 the financial data that were supplied are all the sales  
19 that are attributable to the UCS system. And Cisco has  
20 explained that the UCS system is a unified system.

21 As such, the sales of the individual pieces are  
22 all being comprised towards the unified system.

23 Q So your analysis is based on the assumption  
24 that various UCS components are sold only as a single  
25 system?

Ryan Sullivan, Ph.D. - Confidential Attorneys' Eyes Only  
June 22, 2018

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1 DECLARATION UNDER PENALTY OF PERJURY

2

3 I, Ryan Sullivan, Ph.D., do hereby certify  
4 under penalty of perjury that I have read the foregoing  
5 transcript of the proceedings taken on June 22, 2018;  
6 that I have made such corrections as appear noted on the  
7 Errata Sheet, attached hereto, signed by me; that my  
8 testimony as contained herein, as corrected, is true and  
9 correct.

10

11 Dated this 3rd day of August, 2018, at  
12 San Diego, California.

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Ryan Sullivan, Ph.D.

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Ryan Sullivan, Ph.D. - Confidential Attorneys' Eyes Only  
June 22, 2018

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1 ERRATA SHEET

2 Page No. 156 Line No. 20

3 Change: "my nationals." to "my analyses."

4 Reason for change: Typographical error

5 Page No. 166 Line No. 14

6 Change: "the technology" to "the patented technology"

7 Reason for change: Typographical error

8 Page No. 170 Line No. 12

9 Change: "terms of that's what's" to "terms of what's"

10 Reason for change: Typographical error

11 Page No. 170 Line No. 17

12 Change: "and 909" to "and 99"

13 Reason for change: Typographical error

14 Page No. 182 Line No. 19

15 Change: "commercialization, the" to "commercialization of the"

16 Reason for change: Typographical error

17 Page No. 184 Line No. 4

18 Change: "I would have to look for." to "I would have to look."

19 Reason for change: Typographical error

20 Page No. 187 Line No. 6

21 Change: "situations not." to "and situations where it would not."

22 Reason for change: Typographical error

23 

24 25 Ryan Sullivan, Ph.D.

August 3, 2018

Dated